Office - Supreme Court, U.S.
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JUN 28 1982
ALEXANDER L. STEVAS
CLERK

81-2384

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GENERAL LONGSHORE WORKERS, ILA,
LOCALS 1418 and 1419,
Petitioners,

v.

FALLON W. BENTZ, Acting Regional Director of the Fifteenth Region of the National Labor Relations Board,
Respondent,

and

GREAT SOUTHERN, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DENNIS ANGELICO
HESS AND WASHOFSKY
1411 Decatur Street
New Orleans, LA 70116
(504) 949-2742

JULES BERNSTEIN
(Counsel of Record)
ORRIN BAIRD
CONNERTON & BERNSTEIN
1899 L Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 466-6790

Attorneys for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED FOR REVIEW

Did the district court exceed its authority under Section 10(*l*) of the Labor Management Relations Act by awarding affirmative monetary relief following a final decision on the underlying unfair labor practice by the NLRB which had denied the same relief?

PARTIES TO THE PROCEEDINGS BELOW

Fallon W. Bentz, Acting Regional Director, Region 15, National Labor Relations Board

General Longshore Workers, ILA, Locals 1418 and 1419 (now merged—Local 3000)

New Orleans Steamship Association

Panama City Port Authority

Great Southern Paper Company

International Navigation, Ltd.

Central Gulf Lines, Inc.

Alley & Alley, Chartered

Sale, Bryant, Thompson & Kurvin

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, General Longshore Workers, ILA, Locals 1418 and 1419 (now merged—Local 3000), pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in the above-titled case.

REPORT OF THE OPINIONS BELOW

The opinions of the district court and of the court of appeals are not reported. They are reproduced as Appendices A-G.

JURISDICTION

The court of appeals issued its judgment denying petitioners' appeal on March 29, 1982. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 10(*l*) of the Labor Management Relations Act, 1947, 61 Stat. 146 *et seq.*, 29 U.S.C. § 160(*l*), provides in pertinent part as follows:

> Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b)(7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law. . .

STATEMENT OF THE CASE

This matter arose pursuant to unfair labor practice charges filed by the Panama City Port Authority ("Panama City"), respondent herein, with the Fifteenth Region of the National Labor Relations Board ("NLRB") in April 1975. Panama City alleged that the collective bargaining agreement between the General Longshore Workers, ILA, Locals 1418 and 1419 ("Unions"), petitioners herein, and the New Orleans Steamship Association ("NOSSA") contained an illegal "hot cargo" provision. The disputed provision, which had been in effect

since October 1, 1974, required the employers to pay to the NOSSA-ILA Pension Welfare Vacation and Holiday Funds ("Trust Funds") a royalty based on tonnage for all cargo which was loaded into or discharged out of LASH/SEABEE cargo containers by non-ILA labor.

The General Counsel of the NLRB issued a complaint aganist the Unions alleging that they had violated Sections 8(b)(4)(ii)(A) and (B) and Section 8(e) of the Labor Management Relations Act, 1947, ("the Act")[1] by negotiating and enforcing the royalty provision.

Under the authority of Section 10(*l*) of the Act, the Acting Regional Director for the Fifteenth Region of the NLRB, respondent herein, petitioned the United States District Court for the Eastern District of Louisiana for an injunction to prohibit the continued enforcement of the disputed contract provision. On March 15, 1976, the district court issued a memorandum and order (Appendix G) finding that there was "reasonable cause to believe" that the royalty provision violated Section 8(e) of the Act, enjoining the parties from enforcing the royalty provision and requiring that the parties establish a method of determining during the pendency of the NLRB proceedings the tonnage of LASH/SEABEE cargo containers subject to the royalty clause.

Shortly thereafter, the Unions and NOSSA moved the court to modify its injunction to provide that all funds due under the royalty provision be deposited in the court's registry so that the funds would be available for distribution in accordance with the NLRB's order. On June 28, 1976, pursuant to these motions, the district court entered a second order (Appendix F) in which, relying upon an order entered in a similar case by the United States District Court for the Southern District of Alabama,[2] it modified its initial injunction by requir-

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[1] 29 U.S.C. § 158(b)(4)(ii)(A) and (B) and § 158(e).

[2] *Bentz v. International Longshoremen's Association, Local 1410 (Longshore Division)*, C.A. No. 75-507-H (S.D. Ala. 1976).

ing the parties to deposit into the district court's registry all funds collected or due under the royalty provision since the date of the initial injunction. The district court reasoned that this was the "most equitable means to maintain the status quo pending final determination by the NLRB."

In compliance with the latter order, both NOSSA and the Administrator of the Trust Funds deposited into the district court's registry all monies collected or due pursuant to the royalty provision since March 15, 1976. Those monies remained in the court's registry and were invested in United States treasury bills earning the prevailing rate of interest.[3]

After the issuance of the Section 10(*l*) injunction by the district court, the unfair labor practice complaint was litigated before the NLRB. Both the General Counsel of the NLRB and the charging party, Panama City, demanded that the NLRB direct reimbursement of all funds collected pursuant to the challenged royalty provision to those employers who had paid the royalties. The Administrative Law Judge ("ALJ") found that the royalty provision violated Section 8(e) of the Act[4] but expressly denied reimbursement of the monies paid pursuant to the provision. The ALJ reasoned that:

> As the royalties paid by these employers were not involuntarily exacted from them by unlawful means but were sanctioned by the contract to which they voluntarily agreed, I deem it inappropriate to grant the General Counsel's request.

On March 17, 1978, the NLRB adopted the ALJ's recommended decision and order *in toto*.[5] No appeal was

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[3] At the time of the court of appeals' decision, the amount of the royalty payments plus interest which had accumulated in the district court's registry was approximately $1.6 million.

[4] The ALJ recommended that the Section 8(b)(4)(ii)(A) and (B) charges be dismissed.

[5] *Longshoremen, ILA, Locals 1418 and 1419 (New Orleans Steamship Assn.)*, 235 NLRB 161 (1978).

taken from the NLRB's order, and thus it is now final. As required by the order, the royalty provision is no longer in effect.

After issuance of the NLRB order, proceedings were renewed in the district court. On April 6, 1979, the district court dissolved the Section 10(*l*) injunction and permitted Panama City, Great Southern Paper Co. Ltd., International Navigation, Ltd., and Central Gulf Lines, Inc., respondents herein, to intervene on the issue of the proper distribution of the funds held in the court's registry. (Appendix E). Addressing the disposition of those funds, the district court reasoned that the funds had been held in the court's registry "to protect the interests of all parties, pending the Board's adjudication" and that since the NLRB had found the royalty provision unlawful, the funds should be returned to those who paid them. As to the NLRB's refusal to grant reimbursement, the district court held that the NLRB's order was not "applicable to the funds deposited in the registry of the court and thus [the NLRB's order had] no effect with respect to the final disposition of those funds." [6]

The determination of an actual allocation of the funds to the various stevedore and shipping companies which made payments into the court's registry was referred to a United States Magistrate serving as a Special Master. (Appendix E). After proceedings before the Magistrate, his findings and recommendations regarding distribution

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[6] Respondents argued below that the Unions' position after the NLRB decision conflicts with their position taken at the time that the Section 10(*l*) injunction was issued. At that time, both the Unions and NOSSA justified modifying the Section 10(*l*) injunction to require that the royalty payments be paid into the district court's registry on the grounds that if this were done the monies held in the court's registry would be readily available to be distributed to the contributors if the Unions did not "prevail" before the NLRB. Clearly, the Unions did "prevail" at the NLRB on the crucial issue of reimbursement, and thus, their position has been consistent throughout this litigation.

of the monies were issued on March 27, 1980. (Appendix D). The district court adopted the Magistrate's findings and recommendations, and judgment was entered accordingly on January 20, 1981. (Appendices B and C).

Petitioners herein appealed to the United States Court of Appeals for the Fifth Circuit which affirmed the district court's judgment on March 29, 1982. (Appendix A).

REASONS FOR GRANTING THE WRIT

This Case Involves An Important Federal Question Which Should Be Decided By This Court

This case presents an important question concerning the relationship between a district court's authority to grant relief under Section 10(*l*) of the Act and the NLRB's authority to determine the appropriate remedy for unfair labor practices pursuant to Section 10(c) of the Act, 29 U.S.C. § 160(c).[7] Specifically, the issue presented for review is whether a district court under Section 10(*l*) of the Act may award affirmative monetary relief following a final decision on the underlying unfair labor practice by the NLRB which had denied the same relief.

In the instant case, the district court by means of a modified preliminary injunction issued before the NLRB's decision on the merits of the unfair labor practice complaint created a fund into which were paid the proceeds of the disputed contract provision. After the NLRB issued its decision in which it denied reimbursement of the monies collected pursuant to the disputed contract clause, the district court retained jurisdiction over the fund. In doing so, it ordered reimbursement of the funds collected under the challenged provision despite the fact that the NLRB had expressly declined to order such reimbursement. The effect of the district court's ruling was to award permanent affirmative relief to those who had

[7] Reproduced in pertinent part in Appendix H.

paid the royalties notwithstanding that the NLRB had denied the same relief which the district court awarded.

In 1947 Congress amended the Labor Management Relations Act to add Sections 10(j) and 10(*l*).[8] The purpose of these two sections was to provide for preliminary injunctive relief where such relief was necessary to avoid having the NLRB's remedial authority rendered meaningless pending a final NLRB decision on the merits. The Senate report which accompanied these 1947 amendments states in pertinent part:

> Time is usually of the essence in [unfair labor practice cases], and consequently the relatively slow procedure of Board hearing and order, followed many months later by an enforcing decree of the circuit court of appeals, falls short of achieving the desired objectives—the prompt elimination of the obstructions to the free flow of commerce and encouragement of the practice and procedure of free and private collective bargaining. Hence we have provided that the Board, acting in the public interest and not in vindication of purely private rights, may seek injunctive relief in the case of all types of unfair labor practices and that it shall also seek such relief in the case of strikes and boycotts defined as unfair labor practices. Senate Report No. 105 on S. 1126, 80th

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[8] The district court's authority to issue temporary injunctive relief is similar under Section 10(j) and Section 10(*l*). *NLRB v. Nash-Finch Company*, 404 U.S. 138, 142 (1971); *see Garner v. Teamsters*, 346 U.S. 485, 493 (1953). The difference between the two sections is that a Section 10(j) injunction may only be granted after the issuance of an unfair labor practice complaint but may restrain the commission of any unfair labor practice, whereas a Section 10(*l*) injunction may be sought prior to the issuance of the complaint but may restrain only certain specified unfair labor practices. In addition, under Section 10(*l*), the Regional Director of the NLRB must seek temporary injunctive relief if he has reasonable cause to believe one of the enumerated unfair labor practices has been committed, while under Section 10(j), the decision to seek temporary injunctive relief is discretionary with the Regional Director.

> Cong., 1st Sess. 8, *reprinted in* 1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 433.

In *Amalgamated Clothing Workers v. Richman Brothers*, 348 U.S. 511, 516-517, this Court described the role of Sections 10(j) and 10(*l*) in the legislative scheme as follows:

> Congress has provided an administrative agency to pass on claims that rights granted by the Act are denied or that restrictions imposed by the Act are disregarded . . . [I]njunctive relief or a temporary restraining order may be obtained by the Board from the appropriate District Court, pending final adjudication by the Board . . . Congress explicitly gave such jurisdiction to the district courts only on behalf of the Board on a petition by it or "the officer or regional attorney to whom the matter may be referred." § 10(j), (*l*), 61 Stat 149, 29 USC § 160(j), (*l*). To hold that the Taft-Hartley Act also authorizes a private litigant to secure interim relief would be to ignore the closely circumscribed jurisdiction given to the District Court and to generalize where Congress has chosen to specify.

The courts can remain true to this legislative intent by issuing temporary relief under Sections 10(j) and 10(*l*) only in situations where the failure to grant such temporary relief will effectively nullify the efficacy of the NLRB's final order prior to its issuance. *NLRB v. Aerovox Corp. of Myrtle Beach*, 389 F.2d 475, 477 (4th Cir. 1967); *Minnesota Mining and Manufacturing Company v. Meter*, 385 F.2d 265, 270-271 (8th Cir. 1967); *Angle v. Sacks*, 382 F.2d 655, 660 (10th Cir. 1967). Since Sections 10(j) and 10(*l*) were only intended to provide temporary injunctive relief pending final adjudication by the NLRB, once the NLRB has reached a final resolution of the underlying unfair labor practice charge, the district court's authority to grant relief under Sections 10(j) and 10(*l*) terminates. *Sears, Roebuck & Co. v. Carpet,*

Linoleum, Soft Tile Layers, Local 419, 397 U.S. 655, 659, *reh'g denied*, 399 U.S. 917 (1970). Once the NLRB issues its final order, continued judicial relief may be obtained only in the court of appeals pursuant to Section 10(e) of the Act, 29 U.S.C. § 160(e),[9] which provides for enforcement of NLRB orders and interim injunctive relief pending appellate review. *Sears, Roebuck & Co.* v. *Carpet, Linoleum, Soft Tile Layers, Local 419, supra*, at 659. Thus, this Court has observed:

> Where the Board ultimately finds no unfair labor practice, it would clearly be contrary to the policies of the Act to permit a district court injunction to remain in effect pending Court of Appeals review of the District Court's action. And where the Board does find an unfair labor practice, § 10(e) provides an adequate remedy should its order be disobeyed. *Id.* at 658-59 (footnotes omitted).

Hence, the district court herein should have held the funds in its registry *solely* for the purpose of ensuring that those funds were available to be distributed in accordance with the mandate of the NLRB. Had the district court properly exercised its authority under Section 10(*l*), it would have distributed the moneys to the Trust Funds when the NLRB denied the General Counsel's reimbursement request.

Instead, the decisions of the courts below in this case wrongfully sanctioned an unwarranted intrusion into the NLRB's exclusive jurisdiction. Distribution of the funds held in the registry of the court to those who had paid the royalties amounts to an improper award of permanent relief by the district court in excess of its authority under Section 10(*l*). The district court justified the creation of the fund on the ground that it protected the interests of all the parties pending final resolution of the unfair labor practice charge by the NLRB. Yet, the effect of the

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[9] Reproduced in pertinent part in Appendix I.

creation of the fund was to establish jurisdiction *for the district court* to award affirmative relief after final resolution of the unfair labor practice charges by the NLRB which expressly denied such relief.

This intrusion into the exclusive jurisdiction of the NLRB cannot be justified as being necessary to protect the interests of private parties. The Act does not exist "to adjudicate private rights but to effectuate a public policy." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 192-193 (1941). Indeed, this Court has recognized that Sections 10(j) and 10(*l*) were enacted to authorize:

> [T]he Board, acting in the public interest *and not in vindication of purely private rights*, to seek injunctive relief in the case of all types of unfair labor practices . . . *Garner v. Teamsters*, *supra*, at 493 (emphasis added).

In short, this case presents a substantial federal question concerning the jurisdiction of the district courts to grant relief under Sections 10(j) and 10(*l*) of the Act. This Court granted a writ of certiorari to review a closely-related question in *McLeod v. General Electric Company*, 385 U.S. 533 (1967)[10] because the issue in that case had not previously been passed upon and was of continuing importance in the proper administration of the Act. *See McLeod v. General Electric Company*, 87 S.Ct. 5, 17 L.Ed.2d 45 (1966) (Justice Harlan in Chambers). The issue involved in *McLeod* concerned the standards to be applied by a district court pursuant to Section 10(j) in ordering an employer to bargain with a union pending the NLRB's decision on an unfair labor practice alleging that the employer had failed to bargain in good faith.

However, the Court never reached the underlying issue in *McLeod* because it determined that the case should

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[10] *McLeod* involved injunctive relief under Section 10(j). However, the standards for granting injunctive relief under Section 10(j) should be the same as the standards for granting injunctive relief under Section 10(*l*). See footnote 8, *supra*.

be remanded so that the district court could determine in the first instance the effect of intervening events upon the appropriateness of injunctive relief. *McLeod v. General Electric Company*, *supra*, 385 U.S., at 535. Indeed, in light of the Court's decision in *Sears, Roebuck & Company v. Carpet, Linoleum, Soft Tile Layers, Local 419*, *supra*, it is unlikely that many Section 10(j) or 10(*l*) cases will be presented for review in this Court since most, if not all, such cases will be rendered moot by intervening settlements or NLRB decisions on the merits of the underlying unfair labor practice cases. Thus, this case presents an appropriate vehicle for the Court to review a substantial question of continuing importance in the administration of the Act. Since the resolution of this question has been left open by *McLeod*, the Court should grant a writ of certiorari in this case.

A Writ Should Issue Since This Case Is Closely Related To A Case Presently Pending Before The Court

On May 17, 1982, the Court granted a writ of certiorari in *Shepard v. NLRB*, No. 81-1627, 50 U.S.L.W. 3908 (May 18, 1982). The question presented for review in that case concerned the standards employed by the NLRB in formulating "make whole" remedies in cases involving illegal voluntary "hot cargo" agreements.[11] The

[11] The petitioner stated the questions for review in *Shepard* as follows:

1. Whether the Court below erred in upholding the National Labor Relations Board's requirement that actual coercion must have been used to enforce a voluntary "hot cargo" agreement before a "make whole" remedy was appropriate for a violation of Section 8(e) of the Labor Management Relations Act.

2. Whether the Court below erred in enforcing the National Labor Relations Board's Order denying the petitioner a "make whole" remedy and allowing respondent labor union to retain petitioner's initiation fees, dues and fringe benefit contributions obtained through the enforcement of a "hot cargo" agreement prohibited by Section 8(e) of the Labor Management Relations Act.

identical question raised by *Shepard* was decided by the NLRB in adjudicating the unfair labor practice charges in the instant case. *General Longshoremen, ILA, Locals 1418 and 1419 (New Orleans Steamship Assn.), supra.*

Indeed, at the very heart of petitioners' claim herein is the contention that the rulings of the courts below in this case frustrate the NLRB's exclusive authority to formulate remedies in unfair labor practice cases and specifically in unfair labor practice cases involving voluntary "hot cargo" agreements which have been ruled unlawful under Section 8(e) of the Act.

There exists an obvious need for uniform administration of the Act and harmony between the remedial authority of the district courts under Section 10(*l*) and the NLRB's remedial authority under Section 10(c). Hence, a writ should issue herein so that this case may be considered simultaneously with *Shepard.*

CONCLUSION

For the reasons set forth above, petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

DENNIS ANGELICO
HESS AND WASHOFSKY
1411 Decatur Street
New Orleans, LA 70116
(504) 949-2742

JULES BERNSTEIN
(Counsel of Record)
ORRIN BAIRD
CONNERTON & BERNSTEIN
1899 L Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 466-6790

Attorneys for Petitioners